STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

APPELLANT

APPELLATE CASE NO. 2015-001905

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

In a self-defense case, whether the trial court erred in charging the jury they could infer malice based on the "felony murder rule" where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm?

2.

Whether appellant was entitled to a directed verdict on the attempted murder charge because the State failed to prove appellant had the specific intent to kill the victim where it was undisputed that the victim was not appellant's intended target in self-defense?

3.

Whether appellant was entitled to a mistrial when, during the solicitor's closing argument, she tossed the gun on top of the clothing appellant wore the night of the shooting and told the jury that if they had not proved their case, "then find him not guilty. We will give him back all of his stuff and put him back out on the street[?]"

STATEMENT OF THE CASE

On November 13, 2013, a Richland County grand jury indicted appellant for attempted murder, possession of a stolen pistol, possession of firearm or ammunition by person convicted of a violent felony, unlawful carrying of a pistol, unlawful possession of a weapon by a person convicted of a crime of violence, and possession of a weapon during the commission of a violent crime. R. ___. On August 10 – 17, 2015, appellant was tried before the Honorable Robert E. Hood and a jury. Tr. 1. Luck Campbell, Meghan Walker, and Dolly Garfield represented the State. Tr. 1. Aimee Zmroczek and Bridgette Brown represented appellant. Tr. 1.

Judge Hood directed a verdict on the possession of a stolen pistol charge. Tr. 871, ll. 6 – 18. The jury convicted appellant on the remaining three charges. Tr. 1170, ll. 1 – 25. Judge Hood sentenced appellant to thirty years' imprisonment for attempted murder, a consecutive term of of five years' imprisonment for possession of a weapon during the commission of a violent crime, a consecutive term of five years' imprisonment for possession of a weapon by a person convicted of a violent felony, a concurrent term of five years' imprisonment for possession of a weapon by a person convicted of a crime of violence, and a sentence of one year's imprisonment for unlawful carrying of a pistol. R. 1187, ll. 3 – 22. This appeal follows.

ARGUMENT

1.

In this self-defense case, the trial court erred in charging the jury they could infer malice based on the "felony murder rule" where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm.

Relevant Facts

Two crucial facts were undisputed in this case. First, it was undisputed that the victim in this highly-publicized case, Martha Childress ("Childress"), was not the intended target of the bullet that tragically left her paralyzed. Tr. 1071, ll. 24 – 25. Second, it was undisputed that appellant was guilty of two firearm status crimes. Defense counsel conceded appellant's guilt on these crimes in her opening statement.[1] Tr. 222, ll. 18 – 23.

A friend of Childress's testified that they were waiting with a crowd in front of the fountain in Five Points for a taxi when Childress fell. Tr. 245, ll. 11 – 16. Childress said she could not feel her legs. Tr. 245, ll. 17 – 19. EMS quickly arrived, found a gunshot wound in Childress's chest, and transported her to the hospital. Tr. 229, ll. 8 – 9. Tr. 232, l. 22 – 233, l. 14. Tr. 234, l. 16 – 235, l. 6. Childress survived the shooting, but suffered internal injuries and a permanent spinal cord injury. Tr. 259, l. 16 – 260, l. 5.

The shooting occurred after 2:00 AM early Sunday morning after a Saturday that included the State Fair and a Gamecock road football game. Tr. 276, ll. 5 – 13. Five

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[1] As noted by defense counsel in her opening statement, appellant pled guilty in federal court to a firearm-related crime. Tr. 222, ll. 18 – 23. During sentencing, Judge Hood stated that it was likely that appellant's federal sentence would run consecutive to his state sentence. Tr. 1186, ll. 3 – 14.

Points was crowded. Tr. 276, ll. 2 – 24. Many witnesses testified they heard more than one shot. Childress's friend testified she heard "[a]bout four or five" gunshots. Tr. 245, ll. 11 – 13. The police officer who was the first person to respond to Childress heard at least two shots. Tr. 277, ll. 16 – 19. He could not tell who fired the shots. Tr. 277, ll. 18 – 19. Another police officer at the scene admitted on cross-examination that it was possible that he heard multiple shots and that the report he wrote after the incident just used the word "shots." Tr. 356, ll. 2 – 24. Many witnesses testified they heard more than one shot. Tr. 433, ll. 9 – 10 (Ryan Ellison); Tr. 464, ll. 23 – 25 (Asia Bethel); Tr. 497, ll. 22 – 23 (Taqayya White); Tr. 503, ll. 6 – 12 (Byron Tucker); Tr. 536, ll. 7 – 11 (Shante Bethel); Tr. 641, ll. 23 – 25 (Donnell Woodard); Tr. 940, ll. 9 – 12 (Appellant).

The Two Groups

Childress did not know the person who shot her. Tr. 260, ll. 11-14. Appellant Michael Juan Smith ("Smith") was in Five Points that night with his girlfriend, Shante Bethel and some of their friends. Tr. 530, ll. 2 – 4. The people in Smith's group were Smith, Shante Bethel, Asia Bethel, Taqayya White, and Ryan "Rondo" Ellison (collectively, the "Smith Group"). Tr. 530, ll. 2 – 4. The Smith Group encountered "a group of three guys." Tr. 533, ll. 19 – 24. These three men were Daquan Samuel, Byron Tucker, and Donnell Woodard (collectively, the "Samuel Group"). Tr. 500, l. 20 – 501, l. 9.

Numerous videos from cameras in Five Points were introduced by both sides during the trial. State's Exhibit 74 is an edited version that condenses footage from several cameras into one edited video. Tr. 310, ll. 9 – 19. (State's Ex. 74). At the very beginning of State's Exhibit 74, Ryan Ellison is the first of the Smith Group to appear.

(State's Ex. 74). He is a tall, thin, black male wearing a white "Aeropostale" t-shirt. (State's Ex. 74). Two of the other girls in the Smith Group follow Ryan Ellison. (State's Ex. 74). Shante Bethel follows wearing white pants. Tr. 296, ll. 2 – 11. (State's Ex. 74). Smith is the last of the group wearing a tan outfit with a black undershirt. (State's Ex. 74).

Approximately twenty seconds into State's Exhibit 74, members of the Samuel Group appear. Tr. 293, ll. 5 – 14. (State's Ex. 74). Byron Tucker is wearing a black shirt that says "Watch Out for the Alphabet Boys." Tr. 500, ll. 20 – 23. (State's Ex. 74). (Defendant's Ex. 3). Donnell Woodard is wearing a short-sleeved white shirt that says "Bustin' It." Tr. 638, ll. 21 – 25. (Defendant's Ex. 2). (State's Ex. 74).

The Shooting, the Videos, and the Aftermath

The members of the Samuel Group exchange words with Smith. Tr. 293, ll. 5 – 14. (State's Ex. 74). Tucker admitted that Woodard used the word "slob" which is a derogatory term that is "a disrespect towards the Bloods." Tr. 509, ll. 10 – 19. Tucker agreed that Woodard was a criminal and that he knew Woodard was going to cause trouble the night of the shooting. Tr. 509, ll. 8 – 9. Tr. 512, ll. 11 – 12. Shante Bethel admitted being affiliated with the Folks gang and stated that the members of the Samuel Group were in the Folk gang. Tr. 547, ll. 4 – 12. She heard a member of the Samuel Group use the word "slob" and made statements "like throwing down Blood." Tr. 548, l. 2 – 549, l. 9. She stated that appellant had a lot of friends and family members who were Bloods. Tr. 548, l. 22 – 549, l. 2. Appellant stated that during this initial altercation with the Samuel Group he heard them call him a "slob." Tr. 937, ll. 11 – 16. Appellant denied being a member of the Bloods, but said he had many friends who were members. Tr.

937, ll. 19 – 22. Shortly thereafter on the video, from another angle, Smith moves a handgun from one pocket to another. (State's Ex. 74).

From another angle, the Smith Group makes their way through the crowd waiting on taxis near the fountain. (State's Ex. 74). Childress is visible standing near the curb. (State's Ex. 74). The Smith Group heads toward an Exxon station past the fountain. (State's Ex. 74). The Samuel Group is already near the Exxon station. (State's Ex. 74). Daquan Samuel can be seen wearing a long-sleeved white shirt near Byron Tucker. Tr. 638, l. 21 – 639, l. 3. (Defendant's Ex. 2). (State's Ex. 74).

The Samuel Group turns around and follows the Smith Group. (State's Ex. 74). The two groups confront each other. (State's Ex. 74). Childress suddenly falls, which is the moment immediately after the gunshots. (State's Ex. 74). People duck and run. (State's Ex. 74). Daquan Samuel begins heading toward the fountain where Childress was shot. (State's Ex. 74). Donnell Woodard shoots the bird at the Smith Group. Tr. 642, l. 25 – 643, l. 13.

Defense expert Christopher Watkins ("Watkins") produced edited videos depicting several camera angles. Tr. 892, l. 9 – 896, l. 14. (Defendant's Ex. 6, 21). Watkins "matched up" the times on the videos to synchronize events depicted on the different cameras. Tr. 896, ll. 6 – 14. The State introduced a version of Watkins' video as State's Exhibit 101. Tr. 827, ll. 6 – 828, l. 18. (State's Ex. 101).

Samuel runs through the fountain area. (State's Exhibit 101). Samuel appears to

be holding something that looks like a gun in his hand. [2] (State's Ex. 101). Tr. 899, ll. 17 – 24. Samuel then runs across the street and hovers near an area with several trash cans. (State's Ex. 101). Tr. 899, ll. 17 - 24.

Smith took the stand in his own defense. Tr. 935, ll. 5 – 6. He brought a gun to Five Points because he had been assaulted there a couple of months before the shooting. Tr. 936, ll. 4 – 24. Smith said they were getting ready to leave when he heard a shot and "somebody screamed they had a gun." Tr. 938, ll. 2 – 7. Smith fired one shot back. Tr. 938, ll. 6 – 9. Smith testified that he "was scared for my life. I was scared I was going to get shot, so I returned a shot." Tr. 939, ll. 17 – 19. Smith was extensively cross-examined by the State on the contents of his jail calls which contained inflammatory comments about the victim and witnesses. Tr. 939, l. 25 – 993, l. 11.

Ellison testified he never saw a gun that night. Tr. 432, ll. 18 – 20. He heard two or three gunshots, ducked, then ran towards the car. Tr. 432, l. 24 – 433, l. 10. White testified that the man "in the white shirt, he just started acting crazy, like he was about to pull out a gun, pulling up his shirt." Tr. 488, ll. 10 – 20. The man in the white shirt was "clutching" like he was about to pull out a gun. Tr. 489, ll. 3 – 6. According to White,

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[2] Multiple viewings of this video are unlikely to provide concrete proof of whether Samuel was holding a gun. (State's Ex. 101). The video's lack of clarity did not stop the solicitor from excoriating defense counsel in closing for suggesting that Samuel held a gun and claimed that Samuel only had dark-complected hands. Tr. 1109, ll. 17 – 23. The solicitor called defense counsel's argument "the most offensive thing that's happened in the courtroom this week." Tr. 1109, ll. 17 – 23. As will be further explained below, the erroneous malice charge given by the trial judge relieved the jury of its duty to critically examine the evidence and decide whether the State had disproved self-defense beyond a reasonable doubt. Indeed, the jury deliberated for little more than one hour in a trial that spanned seven days. Tr. 1177, ll. 17 – 25.

they kept walking and then heard gunshots and started running. Tr. 489, ll. 10 – 20. She did not see who fired a gun. Tr. 489, ll.19 – 22.

In the statement White gave the night of the shooting, she told police that a man with braids had a gun. Tr. 495, ll. 22 – 24. White gave a fake name to the police when she gave this statement. Tr. 489, l. 23 – 490, l. 6. White said that the police did not accept her statement that another man had a gun. Tr. 496, l. 25 – 497, l. 9. White agreed with defense counsel that the police issued an arrest warrant and made her come to the station with her mother to "give a statement that they wanted." Tr. 496, l. 25 – 497, l. 9. Shante Bethel agreed with White that she saw the man in the white shirt pull up his shirt and gesture. Tr. 535, ll. 20 – 24. She turned her head. Tr. 535, ll. 20 – 24. She never saw anyone fire a gun. Tr. 536, ll. 1 – 6. She did not see any members of the Samuel Group with a gun. Tr. 536, ll. 2 – 3.

Tucker testified that the Samuel Group was cruising through Five Points just "messing with people pretty much." Tr. 502, ll. 3 – 8. Tucker, who claimed to be "a law-abiding citizen," said that before they went to Five Points he asked his friends if they had any guns on them. Tr. 502, ll. 18 – 25. Tr. 510, ll. 9 – 17. On cross-examination, Tucker admitted telling the police that Woodard was a liar and a member of a rival gang of the Bloods. Tr. 508, l. 17 – 509, l. 9. Samuel and Woodard tried to talk to the girls in the Smith Group. Tr. 504, ll. 4 – 17. One of the girls told them they did not have enough money. Tr. 504, ll. 10 – 17. Samuel pulled out some cash. Tr. 504, ll. 14 – 17. The Smith Group turned back in their direction and then he heard gunshots. Tr. 504, l. 18 – 505, l. 4. Tucker admitted that he walked away from the scene "[w]ith a smile." Tr. 505, ll. 14 – 17.

Woodard denied being in a gang. Tr. 641, ll. 17 – 18. He said no one in his group had a gun that evening. Tr. 641, ll. 19 – 22. Woodward did not see who shot. Tr. 643, ll. 20 – 23. He admitted that after the shooting, he turned around and shot the bird (with both hands) at the Smith group. Tr. 643, ll. 3 – 13. Woodward was arrested that evening for disorderly conduct. Tr. 644, ll. 19 – 21. He had a pending assault and battery charge with the solicitor's office. Tr. 645, ll. 14 – 17. As for Samuel, even though the ATF knew that Samuel was located in Lawrenceville Georgia, he refused to return to Columbia to testify because he was "fearful of gang retaliation." Tr. 826, ll. 13 – 20.

Officer Theodore McLaughlin was on foot patrol in Five Points the night of the shooting. Tr. 341, ll. 10 – 16. He heard gunshots originating from the fountain area. Tr. 341, l. 21 – 342, l. 5. On direct examination, Officer McLaughlin claimed that he heard "[o]ne or 2" shots. Tr. 342, ll. 2 – 5. The report did not say that he heard a pair of shots. Tr. 356, l. 20 – 357, l. 3.

After hearing the gunshots, Officer McLaughlin ran toward the fountain. Tr. 342, ll. 6 – 19. He saw appellant running with his hand in his coat pocket. Tr. 342, l. 20 – 343, l. 3. The officer could tell there was a heavy object in the pocket and caught Smith in front of a pizza restaurant. Tr. 342, l. 24 – 343, l. 20. He took a pistol from Smith's pocket and detained him. Tr. 344, l. 12 – 345, l. 18. Officer McLaughlin said the pistol "was still warm to the touch." Tr. 346, ll. 1 – 3. Smith told Officer McLaughlin, "I didn't mean to shoot." Tr. 350, ll. 3 – 9.

Officer McLaughlin put Smith in the back of the patrol car. Tr. 351, ll. 13 – 17. He turned on the recording device in the patrol car. Tr. 351, ll. 20 – 25. When asked

whether Smith was in the back of the patrol car for "almost 2 hours," Officer McLaughlin replied that he was not sure. Tr. 358, ll. 5 – 7. Smith was respectful. Tr. 358, ll. 22 – 23. The recording was entered into evidence without objection. Tr. 353, ll. 16 – 22.

Michael Painter ("Painter") was visiting Five Points from Florence. Tr. 362, l. 10 – 363, l. 5. He was standing near the fountain. Tr. 363, ll. 6 – 9. He saw a "black man in a tan jacket and tan pants" standing on the corner. Tr. 363, ll. 10 – 16. Two black males wearing black shirts and jeans walked up to the man in the tan jacket. Tr. 363, ll. 13 – 23. Painter saw the two men confront the man in the tan jacket. Tr. 367, ll. 10 – 21. Painter saw "a muzzle flash and heard a pop, pop." Tr. 364, ll. 1 – 2. The muzzle flash came from the man in the tan jacket who ran away from the fountain. Tr. 364, ll. 5 – 25. Painter did not see anyone else with a gun. Tr. 365, ll. 1 – 2.

The police found one shell casing at the scene. Tr. 372, ll. 11 – 20. The police found a blood stain near the fountain. Tr. 379, ll. 7 – 380, l. 9. The distance from the blood stain to the shell casing was approximately 110 feet. Tr. 394, ll. 13 – 15. Revolvers do not eject shell casings. Tr. 411, ll. 5 – 16.

Investigator Gilliam directed the crime scene investigator to collect gunshot residue samples. Tr. 408, ll. 8 – 14. The police collected gunshot residue samples from two subjects, Smith and Rondo Ellison. Tr. 373, l. 17 – 374, l. 22. Investigator Gilliam did not direct the collection of a gunshot residue sample from Donnell Woodard. Tr. 408, ll. 8 – 17.

The Argument Below on the Felony Murder Instruction and the Trial Court's Ruling

After the close of the evidence, the trial judge heard argument from the parties on jury charges. Tr. 1038, l. 4 – 1059, l. 10. The State immediately conceded that the court

should charge self-defense. Tr. 1038, ll. 7 – 8. Defense counsel then argued that a felony murder charge based on the gun indictments was improper because the gun offenses were "status" crimes. Tr. 1038, l. 12 – 1039, l. 13. Appellant argued that carrying a gun illegally was unlike crimes typically associated with felony murder, "like burglary, armed robbery, where you're committing an act that is likely to lead." Tr. 1038, ll. 18 – 22.

The State argued that the felony murder charge just gives the jury "another way to infer malice." Tr. 1039, ll. 15 – 19. Judge Hood asked if any law limited the types of felonies to which the felony murder rule applied and the solicitor replied that she was unaware of any limitation. Tr. 1039, ll. 20 – 25. The solicitor then clarified her position, stating that the "only language" she had seen said "something about felonies that are inherently dangerous." Tr. 1040, ll. 3 – 8. The solicitor then argued that a "person who is not allowed by law to carry a gun would be a felony and is inherently dangerous." Tr. 1040, ll. 3 – 8.

Defense counsel argued that allowing the jury to infer malice from the defendant's illegal possession of a pistol would make him "automatically responsible for the result." Tr. 1040, l. 22 – 1041, l. 2. The court then read his proposed felony murder charge and asked the defense for any case "that says gun possession as a felony" does not trigger the rule. Tr. 1041, ll. 10 – 20. Defense counsel did not respond immediately with a citation, but argued that her research revealed that the felony murder rule "was intended for crimes such as kidnapping, armed robbery, burglary." Tr. 1041, ll. 21 – 24. Judge Hood then took up other issues to allow defense counsel an opportunity to provide authority to the court. Tr. 1041, l. 25 – 1042, l. 7.

After taking up other questions, when the court returned to discussion of the felony murder rule, defense counsel cited Gore v. Leake 261 S.C. 308, 199 S.E.2d 755 (1973) and State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing *in favorem vitae* review). Tr. 1047, l. 7 – 1048, l. 2. Appellant argued that the felony murder rule only applies "to those felonies which are inherently foreseeable dangers to human life." Tr. 1047, ll. 10 – 12.

Judge Hood then ruled that he would give the felony murder charge. Tr. 1048, l. 17 – 1049, l. 21. The trial court stated:

> I believe that the carrying of a firearm in these conditions **with the Defendant's criminal history** put everybody in an extreme risk of danger that was present in the area that night. . . .
>
> So the difference in this situation is it's not like we have somebody in the community lawfully carrying a firearm that chooses to, you know, use it or to defend themselves. This is an individual **who based upon his prior criminal history** would not be allowed to carry a firearm period in state court or in federal court. And so I—you know, I think the unlawful carrying of a pistol by a convicted felon in our community in a situation such as a crowd in Five Points and in a situation where, according to his own testimony, he knew was violent, he had been beaten up and assaulted rises to a different level, and I will charge the version of felony murder.

Tr. 1048, l. 23 – 1049, l. 21 (emphasis added). Judge Hood gave the following charge to the jury:

> Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a weapon by a person being convicted of a crime of violence and possession of a weapon by a person being convicted of a violent felony would be felonies under our law.

> You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow, if one attempts to kill another during the commission of a felony, the inference of malice may arise.

Tr. 1149, ll. 7 – 17. Appellant specifically objected to this instruction after the court charged the jury and before deliberations began. Tr. 1165, ll. 18 – 23.

Discussion

South Carolina has never applied the felony murder rule to status firearm offenses. The trial court's erroneous felony murder charge allowed the jury to infer malice solely from appellant's possession of a firearm. As argued by trial counsel, illegally possessing a firearm is a status crime, not an inherently dangerous *malum in se* crime, and does not provide a sufficient basis to charge the felony murder rule. See Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973) (discussing application of rule to cimes that are inherently evil, or *malum in se*, and criticism of applying rule to other crimes (*malum prohibitum*)).

The giving of a felony murder instruction in this case was particularly egregious because appellant received a self-defense charge. Under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), it is error to charge an inference of malice from the use of a deadly weapon when evidence mitigating the crime exists. If it is improper to charge that malice may be inferred from the **use** of a deadly weapon, then allowing a jury to infer malice from the **mere possession** of a deadly weapon is manifestly erroneous. The trial court's charge transformed a crime of specific intent into one of strict liability.

South Carolina's Felony Murder Rule

Gore contains our Supreme Court's most expansive discussion of the felony murder rule. Gore at 315-18, 199 S.E.2d at 757-59. Gore involved a burglary. Id. at 312-14, 199 S.E.2d at 756-57. A homeowner surprised thieves in her house. Id. The thieves were seen in Gore's car a few blocks away minutes after the robbery. Id. The police chased the car and the culprits crashed. Id. The police and the thieves had a gun battle. Id. Gore fled into the woods and was wounded by a shot from the police. Id. One of his confederates shot and killed a police officer. Id. The jury charge given by the trial judge blended an accomplice liability charge with the felony murder rule. Id. at 314-15, 199 S.E.2d at 757. The examples of felonies given by the trial court were grand larceny, robbery, and burglary. Id.

The Supreme Court surveyed the current status of the felony murder rule in other jurisdictions and in scholarly commentary. Id. at 315-18, 199 S.E.2d at 757-59. The Court first noted that many jurisdictions had statutory versions of the felony murder rule, but no such statute existed in South Carolina. Id. The Court stated that South Carolina had "consistently followed the common law rule" and quoted an early case: "Whenever an unlawful act, an act malum in se, is done in prosecution of a felonious intention, and death ensues, it will be murder." Id. *quoting* State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891).

The Gore Court dismissed the defendant's argument because his cases involved "statutory offenses which were malum prohibitum rather than malum in se." Id. "*Malum in se*" means "A wrong in itself; an act or case involving illegality from the very nature of

the transaction, upon principles of natural, moral, and public law." Black's Law Dictionary, (6th Ed. 1990). "An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." Id. "*Malum prohibitum*" means "a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law." Id.

Expanding on the difference between *malum in se* crimes and *malum prohibitum* crimes, the Gore Court stated:

> Finally, in this connection attention is called to the fact that the felony-murder rule and the application thereof to a homicide committed in connection with the perpetration of 'any felony' has been increasingly criticized and/or modified by a number of writers and courts. It is argued that even though the rule might have sufficient justification when its operation is predicated upon the commission of an inherently dangerous felony, **there is no room for the logical application of that doctrine where the felony committed was not an inherently dangerous one.**

Gore at 316, 199 S.E.2d at 758 (emphasis added). The Court then noted the difference in how jurisdictions decide whether a felony is inherently dangerous. Id. at 316-17, 199 S.E.2d at 758-59. While some jurisdictions considered only the elements of the crime in the abstract, other considered both the nature of the felony and the circumstances surrounding its commission. Id. Ultimately, the Court determined that it did not need to decide this issue because the felony murder rule clearly applied to a burglary and shootout with the police. Id.

The cases cited by Gore as examples of previous applications of the felony murder rule in South Carolina involved inherently dangerous crimes. In State v.

Cannon, 49 S.C. 550, 27 S.E. 526 (1897), a felony murder charge was given in a burglary case. Levelle involved a suicide which was described as *malum in se*. Levelle, 13 S.E. at 321. State v. Johnson, 156 S.C. 63, 152 S.E. 825 (1930) contains limited facts, but one of the exceptions refers to the defendants stealing a watch or money, which likely means that the court applied the felony murder rule to a robbery. In State v. Williams, 189 S.C. 19, 199 S.E. 906, 907-08 (1938), the underlying felony was attempted murder. In State v. Woods, 189 S.C. 281, 1 S.E.2d 190, 193 (1939), the underlying crime was escape. In State v. Ciesiellski, 213 S.C. 513, 515, 50 S.E.2d 194, 194 (1948), the underlying crime "was robbery or burglary." All of these crimes are unquestionably *malum in se* and inherently dangerous.

The Supreme Court next discussed the felony murder rule in the death penalty case of State v. Yates, 280 S.C. 29, 210 S.E.2d 805 (1982). Yates and a confederate robbed a rural store armed with a pistol and knife. Yates at 33, 310 S.E.2d at 807-08. Yates shot the clerk, but did not kill him. Id. The clerk's mother entered the store and Yates ran with the money. Id. Yates' accomplice stabbed the clerk's mother to death, but the clerk got a gun and killed the accomplice. Id.

Yates asked the Court to strike armed robbery as an aggravating circumstance because of the prospect he was convicted on a theory of vicarious liability. Id. at 34, 310 S.E.2d at 808. Rejecting Yates' argument, the Court stated, "Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder." Id. While

not a true felony murder case, the underlying felony—armed robbery—would certainly trigger its application as a *malum in se* crime.

In 1985, the Supreme Court promulgated a jury charge on implied malice and the felony murder rule. State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 342-43 (1985). The underlying felony in Norris was rape. Id. at 89, 328 S.E.2d at 341. The trial judge in Norris gave a felony murder charge nearly identical to the charge given by Judge Hood in this case:

> The law also allows the jury to infer malice if you conclude that the homicide was a proximate, direct result of the commission of a felony. And for that regard, criminal sexual conduct in the first degree would be a felony under our law. You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow.

Id. at 91, 328 S.E.2d at 342 (emphasis removed). The Court, instead of approving the charge given by the trial judge in Norris (and the one given by Judge Hood), promulgated its own "proper charge on implied malice." Id. at 92, 328 S.E.2d at 342-43. The Supreme Court's implied malice charge is:

> The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. The Court's citation for its malice charge indicates that it created this charge from the inference of malice from use of a deadly weapon. Id. *citing* State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983).

In this case, Judge Hood did not give the Supreme Court's approved Norris charge, but instead used the trial judge's charge quoted in the Norris opinion. Tr. 1149,

ll. 7 – 17. Not only was charging felony murder error in this case, the court also used the wrong felony murder charge. Furthermore, the underlying crime in Norris was undoubtedly a *malum in se* crime—rape. The question of the applicability of the felony murder rule to rape was not seriously in quesiton in Norris.

In 2008, the Supreme Court reversed a murder conviction and a life sentence because of trial counsel's failure to object to an improper felony murder charge. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). The underlying crime in Lowry was armed robbery—unquestionably a *malum in se* crime. Id. at 502, 657 S.E.2d at 761. The trial court originally gave the Supreme Court's approved Norris charge on felony murder. Id. at 502, 657 S.E.2d at 762. After the jury was sent to deliberate, the solicitor claimed not to have heard the trial judge's felony murder charge. Id. The trial judge brought the jury back to the courtroom and gave an altered felony murder charge: "That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder." Id. at 503, 657 S.E.2d at 762. The defendant's attorney did not object to this charge. Id.

The Supreme Court held that the additional charge shifted the burden of proof to the defendant and created a mandatory presumption of malice. Id. at 504-07, 657 S.E.2d at 763-64. The Court also held that the additional charge contradicted the proper Norris charge and "exacerbated the error by confusing the jury as to its fact-finding duties with respect to Petitioner's murder charge." Id. While Judge Hood's instruction did not create a mandatory presumption of malice with language such as "makes the killing murder,"

Lowry demonstrates the importance of using the correct Norris charge, not confusing the jury, and reducing the State's burden of proof.

The Impact of State v. Belcher

Belcher shows that the problems which led to a reversal in Lowry are present in appellant's case. In Belcher, the Supreme Court overturned decades of jurisprudence that allowed juries to infer malice from the use of a deadly weapon even when evidence of justification, excuse, or mitigation existed. Belcher at 612, 685 S.E.2d at 810. Belcher received a self-defense charge. Id. The Court found that allowing the jury to infer malice from the use of a deadly weapon where self-defense was charged was both inaccurate and confusing. Id. at 609-12, 685 S.E.2d at 808-10.

Like Belcher, here the jury could have inferred malice solely from Smith's admitted guilt on the weapons charges. The jury also could have found that Smith acted in self-defense, but because of the weapons charges, convicted him despite his justification in shooting. The same confusion and prejudice that the Court found erroneous in Belcher is present in appellant's case.

Furthermore, if the court's felony murder charge is allowed to stand, then our state's malice jurisprudence will contain a massive contradiction. Belcher forbids the inference of malice from the use of a deadly weapon. The jury charge in this case, if approved, would allow the inference of malice from the mere possession of a deadly weapon. Logic and consistency mandate elimination of this contradiction.

The Felony Murder Rule's Application to Status Firearm Offenses in Other Jurisdictions

In most states, the felony murder rule is a creature of statute and limits its application to enumerated felonies. See The Hon. Rudolph J. Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763, 766 (Fall 1999). None of these states apply the felony murder rule to status firearm offenses. See Guyora Binder, Making the Best of Felony Murder, 91 B. U. L. Rev. 403, 450-53 and n.262-79 (Mar. 2011). See also, e.g., Alaska Stat. Ann. § 11.41.100(a) (limiting crimes for first-degree murder to sex offenses and kidnapping of children, first-degree criminal mischief, and terroristic threatening), Alaska Stat. Ann § 11.41.110 (limiting crimes for second-degree murder to arson, kidnapping, sexual assaults, burglary, escape, robbery, and certain drug crimes); Cal. Penal Code § 189 (limiting felonies to arson, rape, carjacking, robbery, mayhem, kidnapping, train wrecking, sex crimes, or shooting a firearm from a motor vehicle); 720 Ill. Comp. St. § 5/9-1(a)(3) (stating that felony murder rule applies to "forcible" felonies), 720 Ill. Comp. St. § 5/2-8 (defining "forcible felony" as including treason, murder, sexual assaults, robbery, kidnaping, burglary and arson); N.D. Cent. Code § 12.1-16-01(1)(c) (listing applicable felonies as treason, robbery, burglary, kidnaping, arson, felony offenses against children, and escape); Me. Rev. Stat. Ann. Tit. 17-A, § 202(1) (defining felony murder as applying to robbery, burglary, kidnapping, arson, sexual assault, and escape); Nev. Rev. Stat. Ann. § 200.030(1)(b) (limiting felonies for first-degree murder to sexual assault, kidnapping, arson, robby, burglary, home invasion, sex crimes, and child/elder abuse); N.H. Rev. Stat. Ann. § 630:1-a (limiting felonies for first-degree murder to sexual assault, armed robbery, burglary, and arson), N.H. Rev. Stat. Ann. § 630:1-b (limiting second-degree murder to Class A felonies), N.H. Rev. Stat. Ann. § 159:3 (stating possession of a firearm by a convicted felon is a Class B

felony); N.H. Rev. Stat. Ann. § 159:4 (stating that carrying a concealed pistol without a license is a Class B felony); N.J. Stat. Ann § 2C:11-3(a)(3) (limiting felonies for murder to robbery, sexual assault, arson, burglary, kidnapping, carjacking, escape, and terrorism); 18 Pa. Cons. Stat. Ann. § 2502(b) (enumerating felonies for second-degree murder as robbery, rape, arson, burglary, and kidnapping). Two states legislatively abolished the felony murder rule. See Haw. Rev. Stat. Ann. § 707-701 (abolishing felony murder rule); Ky. Rev. Stat. Ann. § 507.020 (abandoning felony murder rule as an independent basis for establishing an offense of homicide). The omission of status firearm offenses from felony murder statutes shows that the legislatures of the several states recognize that the felony murder rule should only apply to *malum in se* crimes.

Even where a statutory felony murder rule applies on its face to "any" felony and does not enumerate specific felonies, courts have limited their reach to inherently dangerous felonies. See State v. Anderson, 666 N.W.2d 696 (Minn. 2003). The Minnesota Supreme Court's opinion in Anderson is instructive. In Anderson, the defendant killed the victim with a stolen shotgun and the underlying crimes for the felony murder rule were felon in possession of a firearm and possession of a stolen firearm. Id. at 697. The court confronted Minnesota's second-degree murder statute, which provided that a person was guilty if they killed a person "while committing or attempting to commit a felony offense." Minn Stat. Ann. § 609.19, subd. 2(1). Analyzing the statutory language, the court stated, "Admittedly, under its plain language, except for the three

specified exceptions, the statute appears to apply to all other felonies."[3] Anderson, 666 N.W.2d at 700.

Despite this "plain language," the court determined that the statute did not apply to status firearm offenses. Id. at 698-701. The court examined the history of the felony murder rule in America. Id. The felony murder rule was originally limited in scope because there were few felonies, they were all *malum in se*, and they were all punishable by death. Id. *citing* James J. Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 Wash. & Lee L. Rev. 1429 (1994); 2 Wayne R. LeFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.5 (1986). The court noted that as the number of felonies expanded to include "comparatively minor offenses. . . . many courts have judicially limited the application of the doctrine so that not every felony offense serves as a predicate felony for a felony-murder charge." Anderson, 666 N.W.2d at 699.

The Minnesota Supreme Court ultimately concluded that "the predicate offenses of felon in possession of a firearm and possession of a stolen firearm are not inherently dangerous." Id. at 701. The court distinguished use of a firearm from possession of a firearm. Id. The court found that possession of a firearm by a felon was not dangerous in the abstract and did not have the "special danger" or imminency as the violent crimes traditionally associated with the felony murder rule. Id. See also Griffin v. Commonwealth, 533 S.E.2d 653, 658-60 (Va. 2000) (reversing felony murder conviction based on predicate offense of possession of a firearm by a convicted felon); People v.

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[3] The exceptions are violent crimes, such as criminal sexual conduct, which make the crime first-degree murder. Minn Stat. Ann. § 609.19, subd. 2(1).

Satchell, 489 P.2d 1361, 1370 (Cal. 1971) (reversing a felony murder conviction based on the predicate offense of felon in possession of a concealable firearm and stating, "[W]e find it difficult to understand how any offense of mere passive possession can be considered to supply the element of malice in a murder prosecution.") *overruled on other grounds by* People v. Flood, 957 P.2d 869 (Cal. 1998).

Appellant's Self-Defense Charge Negates the Felony Murder Rule

South Carolina's self-defense and accident jurisprudence further supports adoption of the reasoning of Anderson and the other states that conclude that the felony murder rule does not apply to a status firearm offense. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). In Burriss, the defendant illegally possessed a pistol because he was too young. Id. at 259, 513 S.E.2d at 106. The trial judge refused to charge accident because the defendant "was not acting lawfully because he was in unlawful possession of a firearm." Id. Examining earlier self-defense and accident cases, the court held that "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Id. at 262, 513 S.E.2d at 262 *citing* State v. McCaskill, 300 S.C. 256, 300 S.E.2d 268 (1990) and State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). Under Burriss—and as recognized by the trial judge in charging self-defense—appellant's status firearm offenses did not prevent a self-defense charge. Like Belcher, the rule from Burriss further causes contradiction and confusion in a jury charge if status firearm offenses can serve as the predicate for felony murder where self-defense is charged.

The Kansas Supreme Court confronted the contradiction between the felony murder rule and self-defense in State v. Underwood, 615 P.2d 153 (1980). Prior to its decision in Underwood, Kansas allowed status firearm crimes to serve as the predicate offense for felony murder. Underwood, 615 P.2d at 300-01. The defendant in Underwood was a felon in possession of a firearm and returned with a gun to the scene of an earlier argument. Id. at 155-56. The defendant ultimately shot the man with whom he had argued and claimed self-defense at trial. Id. The Underwood court overruled its earlier precedent, partially because of the conflict between the felony murder rule and self-defense. Id. at 162-63. The court concluded that "filing a charge under the felony murder rule in most, if not all, cases removes any possibility of establishing the defense of self-defense." Id. In part because of this intractable legal dilemma, the court held that status firearm crimes would no longer provide the predicate offense for felony murder. Id. Like in Underwood, the trial court's felony murder charge in this case negated the jury's duty to determine whether the State disproved self-defense beyond a reasonable doubt.

Simply put, mere possession of a firearm is not inherently dangerous. U.S. Const. Amend. II. S.C. Const. art. I, § 20. Possession of a firearm by a convicted felon is *malum prohibitum* and is not inherently dangerous. This Court should not expand our common law felony murder rule to include status firearm offenses, particularly in a case where self-defense is charged. The trial court's felony murder charge allowed the jury to infer malice when it was undisputed appellant had no intent to shoot the victim. The charge contained an inherent contradiction and was confusing. State v. Rothell, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990). This Court should reverse.

2.

Appellant was entitled to a direct verdict on the attempted murder charge because the State failed to prove appellant had the specific intent to kill the victim where it was undisputed that the victim was not appellant's intended target in self-defense.

Even assuming that the bullet in Childress's spine came from appellant's gun, no evidence existed that Childress was appellant's target. The State conceded this point in its closing argument. Tr. 1071, ll. 24 – 25. The State relied wholly on the felony murder rule and the doctrine of transferred intent to prove the intent element of attempted murder. Tr. 1070, l. 24 – 1074, l. 19.

After the close of the evidence, appellant moved for a directed verdict on the attempted murder charge. Tr. 1036, ll. 11 – 19. Defense counsel argued that attempted murder is a "specific attempt crime" and that the State had not proved appellant had "the specific intent to commit a murder under the statutue." Tr. 1036, ll. 11 – 19. The solicitor responded that her position was "that firing into a crowd . . . would be a specific intent to kill." Tr. 1037, ll. 1 – 4. The trial judge denied appellant's motion. Tr. 1077, ll. 5 – 9.

Because attempted murder requires specific intent, the transferred intent doctrine does not apply. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) *cert. granted* Mar. 28, 2016. In King, this Court held that the attempted murder statute requires the State to prove the defendant acted with the specific intent to kill. King at 407-11, 772 S.E.2d at 191-93. The Court relied on the language used by the Legislature when it enacted the attempted murder statute. Id. The Court also relied on State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) in which the Supreme Court

refused to recognize a separate offense of attempted murder and stated that attempted murder would require specific intent. Id.

Furthermore, the transferred intent doctrine does not apply to attempt crimes. State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993). See also People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005) ("The mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of 'transferred intent' applies to murder but not to attempted murder."). In Connecticut, attempted murder requires specific intent. Hinton, 630 A.2d at 601. "Proof of an attempt to commit a specific offense requires proof that the actor intended to bring about the elements of the completed offense. Id. "If the completed offense includes an intent to kill a particular person, the attempt to kill must also include an intent to kill that same person." Id.

"Transferred intent is not needed, however, to insure that a defendant is prosecuted for attempted murder." Id. at 600-02. "A defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim whether a third party is killed **or no one is even injured**." Id. (emphasis added). "The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor." Id. The Hinton court further reasoned that the rule of lenity required this result. Id. See also State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.").

Just like in Hinton, South Carolina's version of attempted murder requires specific intent and South Carolina uses the rule of lenity. The State elected to prosecute appellant for the attempted murder of Childress instead of the attempted murder of

Daquan Samuel, Byron Tucker, and Donnell Woodard. An injury to the victim is not a required element of attempted murder. S.C. Code Ann. § 16-3-29. Therefore, this Court should apply the reasoning of Hinton to this case and hold that South Carolina does not apply transferred intent to attempted murder. Without the doctrine of transferred intent, no evidence existed to sustain appellant's attempted murder conviction. This Court should reverse.

3.

Appellant was entitled to a mistrial when, during the solicitor's closing argument, she tossed the gun on top of the clothing appellant wore the night of the shooting and told the jury that if they had not proved their case, "then find him not guilty. We will give him back all of his stuff and put him back out on the street."

Relevant Facts

The State's closing argument improperly capitalized on the spectre of Columbia's criminal street gangs, their presence in Five Points, and the jury's fear for the own safety and that of the community. Before voir dire, Judge Hood discussed the gang issue with the parties. Tr. 21, ll. 7 – 22, l. 25. Judge Hood asked defense counsel if appellant was going to admit he was in a gang. Tr. 21, ll. 7 – 8. Defense counsel responded, "He may, Your Honor, yes." Tr. 21, l. 9. During voir dire, the trial judge told the prospective jurors that the case "may involve gang activity" and asked if that information would affect their ability to be fair and impartial. Tr. 70, ll. 21 – 24. The trial judge also asked the venire whether anyone was a member of the Five Points Association. Tr. 69, ll. 6 – 8. The jury ultimately went to Five Points to view the scene. Tr. 337, ll. 3 – 24.

The trial judge conducted individual voir dire because of the intense media coverage surrounding this case. Tr. 12, ll. 7 – 15. Tr. 71, l. 1 – 74, l. 12. Many jurors had heard about the shooting. Tr. 75, l. 2 – 134, l. 8. One of the prospective jurors (who was excused) told Judge Hood that appellant "was in gang activity and he accidentally shot [the victim]." Tr. 129, ll. 21 – 25. She also stated that she had "read about it so much in the paper." Tr. 129, ll. 21 – 25. Another prospective juror who was excused told Judge Hood that he had seen gang graffiti in Five Points and that he was "predisposed to thinking that it's a violent place and that crimes are committed." Tr. 132, ll. 4 – 18. Referencing the famed Gamecock running back, the juror said, "I think Marcus Lattimore's grandmother said you can go to Carolina to play ball, but you can't go to Five Points because it's different country at night." Tr. 132, ll. 9 – 14.

After beginning her opening statement talking about Childress's injuries, the solicitor invoked Five Points' importance to Columbia:

> Five Points, a part of history of the City of Columbia, formed about 100 years ago in the root of our city that has brought hundreds of citizens, old and new, to make wonderful memories, celebrations, graduations, anniversaries. It brings old and new, men and women to come find a perfect gift in a store or have the perfect meal together. **Five Points should be about** memories, happy memories, laughter. **It should not be about** gunfire that leads to phone calls to a parent that no parent should ever have to answer.

Tr. 213, l. 24 – 214, l. 8 (emphasis). Defense counsel candidly told the jury that the solicitor's version of Five Points "in this political culture in this political climate does not exist at 2:30 in the morning." Tr. 222, ll. 6 – 9. She told the jury that the individuals involved in this case were gang members. Tr. 222, ll. 15 – 17. She stated that while

appellant had not "been jumped into a gang," he "associates with gang members." Tr. 222, ll. 18 – 23.

Testimony about Gang Affiliation

On cross-examination, Byron Tucker admitted telling the police that Donnell Woodard was a liar and a member of a rival gang of the Bloods. Tr. 508, l. 17 – 509, l. 9. This statement was made to an ATF agent who also confirmed the statement during his testimony. Tr. 844, ll. 1 – 5. Tucker admitted that Woodard used the word "slob" which is a derogatory term that is "a disrespect towards the Bloods." Tr. 509, ll. 10 – 19. Tucker said he had associates and friends who are gang members, but emphatically denied that he was a member of a gang and said he was "a law-abiding citizen." Tr. 509, l. 17 – 510, l. 17. Tucker agreed that Woodard was a criminal and that he knew Woodard was going to cause trouble the night of the shooting. Tr. 509, ll. 8 – 9. Tr. 512, ll. 11 – 12.

Shante Bethel admitted being affiliated with the Folks gang and at one point the solicitor asked her if she had ever said she was the "queen of the Folk." Tr. 547, ll. 9 – 12. Tr. 557, ll. 12 – 17. She stated that the members of the Samuel Group were in the Folk gang. Tr. 547, ll. 4 – 7. She heard a member of the Samuel Group use the word "slob" and made statements "like throwing down Blood." Tr. 548, l. 2 – 549, l. 9. She stated that appellant had a lot of friends and family members who were Bloods. Tr. 548, l. 22 – 549, l. 2. Shante Bethel had previously testified for the State in a case where two children were "gunned down" by a Folk. Tr. 559, ll. 1 – 9.

Taqayya White told the jury she was afraid to testify and that her life was on the line. Tr. 492, ll. 5 – 15. She claimed she had been threatened through Facebook and text

messages on her phone. Tr. 492, ll. 16 – 20. After initially saying she did not know who had threatened her, after prompting from the solicitor she claimed it was appellant and his family. Tr. 492, ll. 16 – 493, l. 1. No pages from Facebook or text messages were produced by the State to corroborate White's claims.

Woodard denied being a member of any gang. Tr. 641, ll. 17 – 18. He was in jail at the time of his testimony. Tr. 653, ll. 16 – 17. Samuel did not testify at trial. The solicitor told Judge Hood that they were attempting to find him, but that he was afraid to attend the trial "because of the gang situation in Columbia and feared retaliation." Tr. 193, ll. 3 – 25.

Appellant denied that he had ever been "initially beaten in" to the Bloods, but admitted he had many friends who were Bloods. Tr. 937, ll. 19 – 22. Appellant stated that during his first encounter with the Samuel Group he knew they believed he was a gang member because they said "slob." Tr. 937, ll. 11 – 16.

As its final witness, the State called Deputy Sheriff Vince Goggins ("Goggins"), supervisor of the Midlands Gang Task Force. Tr. 858, ll. 2 – 20. Goggins told the jury that he kept a "gang database." Tr. 859, ll. 10 – 12. The purpose of the database was for "officer safety." Tr. 859, ll. 13 – 19. Goggins claimed that no one in the Samuel Group was a "documented" gang member. Tr. 860, l. 12 – 861, l. 4.

He said appellant was "a documented Blood gang member" and had been a member since he was fifteen years old. Tr. 861, ll. 5 – 9. He claimed that the "Gangster Killer Bloods is one of our more organized gangs in the state along the east coast." Tr. 866, ll. 2 – 7. Goggins said Smith was making gang signs in photographs introduced by the State. Tr. 861, l. 10 – 862, l. 9. State's Ex. 79, 80. On cross-examination, Goggins

admitted that Columbia had another violent gang called the Folk Nation. Tr. 863, ll. 11 – 18. Goggins stated that members gain rank in a gang by committing violent crimes and that appellant had committed several assaults "from a young age until now." Tr. 866, ll. 8 – 17. The State rested after Goggins' testimony. Tr. 867, ll. 14 – 15.

The Jurors Were Afraid

During the middle of the State's case, the jury sent the following note to the court:

> **We are all concerned about our safety.** It is our understanding that someone in a red shirt took a picture of all of us in the courtroom yesterday. We are not discussing the case, just concerned about our safety. We would like to discuss this with the judge when he has some time.
>
> Thanks,
> Jurors

(Court's Ex. 5). Tr. 578, ll. 4 – 9. After talking to the lawyers in chambers, Judge Hood stated that he questioned the jury about the note. Tr. 578, ll. 10 – 22. The jurors told Judge Hood that they thought they saw someone take a picture of them and heard Judge Hood ban cellphones from the courtroom. Tr. 578, ll. 10 – 15. Judge Hood told them that he banned cellphones from the courtroom because he thought someone had taken a picture of him. Tr. 578, ll. 16 – 20. Judge Hood said that he then asked if anyone was concerned for their safety and the jurors responded they were not. Tr. 578, ll. 21 – 22. The trial judge said, "So they are fine." Tr. 578, ll. 21 – 22.

The solicitor asked whether the court wanted them to investigate and Judge Hood said, "Yes. I think somebody should call Chief Keel. I want a SLED agent." Tr. 579, ll.

2 – 5. Defense counsel stated that she provided names immediately and that if they checked the jail phone calls and family member phone calls they would find no connection to appellant. Tr. 579, ll. 6 – 9. The solicitor replied, "They are both documented Blood gang members, which the defendant is, too." Tr. 579, ll. 11 – 12. One of the solicitors called SLED. Tr. 579, ll. 16 – 19.

The State's Closing Argument, the Mistrial Motion, and the Jurors' Continued Fear for Their Own Safety

The State appealled to fear of gangs in its closing argument. The solicitor recounted White's testimony that she did not want to testify because "the Defendant's family had been threatening her." Tr. 1114, l. 24 – 1115, l. 6. The solicitor called Shante Bethel "the queen of the Folk." Tr. 1118, ll. 14 – 16. She reiterated Goggins' testimony that appellant had been in a gang since he was a teenager. Tr. 1130, ll. 10 – 15.

Near the end of her closing argument, the solicitor told the jury they should base their verdict on the fact that Childress gave Byron Tucker a hug after his testimony. Tr. 1132, l. 13 – 1133, l. 1. The solicitor then stated:

> And if you don't think that we've done it, if you don't think that Michael Painter was right about the man in the tan outfit firing the gun, then find him not guilty. **We will give him back all of his stuff and put him back out on the street.**

Tr. 1133, ll. 2 – 6 (emphasis added). Appellant's objection was sustained and Judge Hood said, "Move on. Disregard the last statement, ladies and gentlemen." Tr. 1133, ll. 7 – 10.

After the trial judge gave his charge and sent the jurors to the jury room, appellant moved for a mistrial based on the Solicitor's inflammatory closing argument. Tr. 1163, l. 1 – 1165, l. 17. Citing State v. Liberte, 336 S.C. 648, 521 S.E.2d 648 (1999), defense counsel argued that the solicitor's comment about putting appellant "back on the streets" was calculated to "specifically inflame the passions and prejudice of the jury." Tr. 1163, l. 11 – 1164, l. 11. Defense counsel argued the solicitor injected an arbitrary factor into the jury's deliberations. Tr. 1163, l. 11 – 1164, l. 11. Appellant cited the due process clauses of the federal and state constitutions, the Eighth Amendment to the federal constitution, and the state constitutional right to trial by an impartial jury. Tr. 1163, l. 11 – 1164, l. 11. U.S. Const. amends. V, VIII, XIV. S.C. Const. art. I, §§ 3, 14.

Defense counsel also described the solicitor's conduct when she made the inflammatory comment about putting appellant "back on the streets." Tr. 1164, ll. 2 – 11. The solicitor took appellant's clothing from the night of the shooting, which was in evidence, and tossed it when she said "We will give him back all of his stuff." Tr. 1164, ll. 2 – 11. She then threw the gun on top of the clothing. Tr. 1164, ll. 2 – 11.

The solicitor did not dispute defense counsel's description of her actions. Tr. 1164, ll. 14 – 23. She instead claimed that she "misspoke" and that she meant to say "find him not guilty." Tr. 1164, ll. 14 – 23. The trial judge denied appellant's motion for a mistrial, finding that the circumstances did not rise to the level of a manifest necessity. Tr. 1165, ll. 4 – 16.

After sending back to the jury room a copy of his written charges, the jury then sent another note expressing their fear: **"There have been concerns expressed by the group about safety."** Tr. 1168, ll. 2 – 23. (Court's Ex. 9). This note from the jury is not

discussed on the record prior to the verdict. Tr. 1168, l. 20 – 1169, l. 20. Judge Hood wrote on the note, "We will insure your safety at the conclusion of the trial! Thank you – REH Written w/the consent of the attorneys REH." (Court's Ex. 9). The jury deliberated for approximately one hour before convicting appellant. Tr. 1177, ll. 17 – 25.

After the verdict, defense counsel renewed her motion for a mistrial based on the Solicitor's closing argument. Tr. 1175, ll. 1 – 24. She argued that because of the inferences that witnesses were in danger of gang activity, the inflammatory "back on the streets" argument, and the jurors' fear as evidenced by their notes denied appellant due process and required a mistrial. Tr. 1175, ll. 1 – 24. The trial judge blamed defense counsel for injecting the gang issue into the case and denied the motion. Tr. 1176, l. 24 – 1177, l. 13.

Discussion

The solicitor's inflammatory argument to an already frightened jury, combined with her theatrics with appellant's clothes and gun, require reversal. A solicitor's argument that appeals to the personal biases of the jury and arouses their passions and prejudices violates due process. Tappeiner v. State, 416 S.C. 239, 250-51, 785 S.E.2d 471, 477 (2016); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). In this case, the solicitor capitalized not only on the jury's general fear of gangs, but on their specific fears for their own safety which they expressed twice in writing to the trial judge.

The solicitor's argument asked the jury to focus on the irrelevant factor of appellant's future dangerousness, not his guilt or innocence. A "jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense

has been proved beyond a reasonable doubt." Simmons v. South Carolina, 512 U.S. 154, 163 (1994). The solicitor's argument was also inaccurate and misleading, as the State knew that appellant had already been convicted and sentenced in federal court and under no circumstances would be "back on the streets." Id. at 170. See also Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.")

The solicitor's argument in this case is nearly identical to the argument that caused reversal in State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). In White, the solicitor told the jury, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" Id. at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of such an argument is to "completely destroy and nullify all sense of impartiality in a case of this kind." Id. at 506, 144 S.E.2d at 482. The Court criticized the solicitor for injecting "into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality." Id. at 507, 144 S.E.2d at 483. The solicitor's argument in this case was even more egregious than in White because the State knew that the jurors feared for their own personal safety, not just that of the community. See Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010).

In Martin v. Estelle, 546 F.2d 177, 179 (5th Cir. 1977), the prosecutor made the same comment as the solicitor in this case. The prosecutor continually referred to highly inflammatory evidence during closing argument. Id. The prosecutor then told the jury that if they found in the defendant's favor he "would be 'back on the streets.'" Id.

Reviewing a habeas decision, the Fifth Circuit reversed. Id. The court found that the prosecutor's highly prejudicial remarks jeopardized the jury's deliberative process and denied the defendant a fair trial. Id.

In another habeas decision by the Fifth Circuit, the court found that introduction of the defendant's prior record required reversal. Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972). In reversing, the court noted the error was "quickened by the prosecutor's emphatic and improper argument." Id. The improper argument made by the prosecutor in Wingate was the same as here: "I am asking you not to allow this man to go back on the street and to redo those things that he has done." Id. at 210.

In a PCR case, the Mississippi Court of Appeals reversed, in part, for trial counsel's failure to object to a prosecutor's "back on the streets" argument. Bigner v. State, 822 So.2d 342, 349 (Miss. Ct. App. 2002). The prosecutor in Bigner told the jury, "And if you want to talk about holding your heads high when you go home, you want to let that man walk out back on the streets? Find him guilty." Id. See also United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992) (finding that prosecutor telling the jury that they had "to 'stand as a bulwark against the continuation of what Mr. Johnson is doing on the street, putting poison on the streets,'" constituted reversible error).

In this case, the solicitor's assertion that she "misspoke" rings hollow because her words were accompanied by the theatrics of throwing the gun on top of appellant's clothes. Tr. 1164, ll. 2 – 11. Such theatrics have been condemned by our Supreme Court. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). In Northcutt, the solicitor threatened the jury that it would be "on your heads" if the defendant killed anyone else, that it would be "open season on babies," and conducted a funeral

procession for the infant victim. Id. at 222-23, 641 S.E.2d at 881-82. The Court reversed because of the inflammatory closing argument. Id.

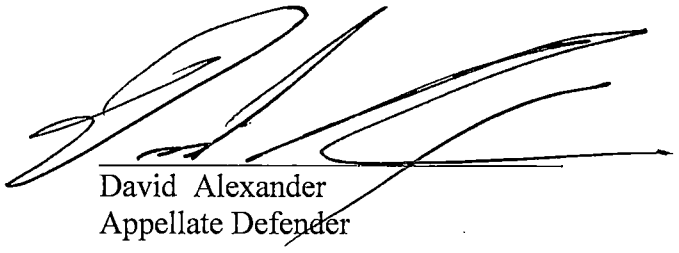
With the knowledge that the jury was afraid for their safety, the State chose to appeal directly to this fear with their "put him back on the streets" closing argument. The solicitor made this point not just with words, but with a frightening deed—tossing appellant's clothing and the gun. Not only did the state misleadingly imply that appellant would be released, but that he would get back his gun. The prejudice is manifest, especially when the jurors sent another note during its abbreviated hour-long deliberations telling the court they were afraid.

Furthermore, the trial judge's reasoning for denying the mistrial—blaming defense counsel for injecting gang affiliation into the case—was error. Unlike many cases where gang membership is irrelevant, it would have been impossible for defense counsel to try this case without explaining appellant's fear of gangs. Gang membership was simply the truth. Aggressive behavior by the rival gang members in the Samuel Group was necessary for appellant to explain his actions and to establish his self-defense case. Nothing about the defense case invited the State to appeal to the jury's extant personal fears. The solicitor also knew that no matter the verdict, appellant would not be "back on the streets" because of his guilty plea in federal court to the gun charges. This improper and misleading closing argument violated appellant's due process right to have the jury try him based on the evidence of his guilt, not fear. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's attempted murder conviction and remand for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Michael Juan Smith, 350413 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC, 29669, this 8th day of August, 2016.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of August, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025